

# Contents

- 1 Rulemakings
- 3 Advisory Opinions
- 7 Reporting
- 8 Outreach

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# Rulemakings

# Advance Notice of Proposed Rulemaking on Technological Modernization

On April 25, 2013, the Commission approved an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment on possible updates to its regulations to address electronic transactions and other technological advances.

Among other things, the Commission is considering whether to revise its regulations to reflect electronic transactions made by debit cards, credit cards, gift cards, Internet-based payment processing and online banking. A rulemaking could also address the receipt, deposit, accounting, recordkeeping, reporting, redesignation and reattribution of electronic transactions, as well as matching funds, conduit activity and contributions made via text message. The Commission is also considering whether to eliminate references to outmoded technologies such as telegrams and fax machines. Comments on whether and how the Commission should make these potential changes, as well as comments addressing general industry practices for electronic transactions, must be received by June 3, 2013.

### **ANPRM**

The Commission seeks to ensure that the regulated community is able to utilize evolving technological innovations while, at the same time, ensuring that the use of such technology is consistent with the Federal Election Campaign Act (the Act), the Presidential Election

Campaign Fund Act and the Presidential Primary Matching Payment Account Act. The Commission seeks comments on revising its regulations to take into account electronic transactions in a way that provides sufficient guidance to the regulated community while reducing the need for serial revisions to reflect new and emerging technologies. The ANPRM asks whether revisions should identify specific, approved means of electronic transactions or whether regulations should provide more general standards.

The ANPRM asks commenters for information on general industry practices regarding commercial and consumer electronic transactions, how political committees receive electronic contributions, and what role, if any, commercial industry standards should play in the Commission's consideration of electronic contribution regulations. The ANPRM also seeks data and comments concerning a wide range of electronic modernization issues, including those highlighted below.

Several Commission regulations have "writing," "signature," and "printing" requirements. For example, Commission regulations require documents to be "signed" before being filed with the Commission without explicitly providing for the possibility of electronic signatures, e.g., 11 CFR 111.4 (submission of complaints), 111.23 (designation of counsel), and 300.37(d) (certifications by certain tax-exempt organizations). And some regulations mention "printed" documents and communications without expressly addressing whether an electronic communication or an attachment to an electronic message, such as a PDF, is considered "printed." The Commission is considering whether it should revise these requirements to address electronic documents and records.

The Commission will also consider comments on the recordkeeping practices for electronic transactions. Commission regulations that require political committees to maintain records of contributions and disbursements do not explicitly account for electronic transactions. Although the Commission has interpreted its recordkeeping regulations in the context of electronic transactions (e.g., Advisory Opinions  $\underline{1995-09}$  (NewtWatch),  $\underline{1994-40}$  (Alliance for American Leadership) and  $\underline{1993-04}$  (Cox)), the ANPRM asks whether the Commission should revise these regulations to address expressly recordkeeping requirements for electronic transactions, for example, by requiring political committees that receive credit card contributions to maintain records with cardholders' names and credit card numbers.

The ANPRM also asks how the Commission should address references in its regulations to technologies that are obsolete or rarely used today, such as telegrams (11 CFR 104.6(c) (1)); typewriters (11 CFR 114.9(d)); and carbon copies of checks (11 CFR 102.9(b)(2) (iii)).

FEC regulations prohibit cash contributions in excess of \$100 (11 CFR 110.4). The Commission seeks comments on whether prepaid debit, credit, banking and gift cards should be considered the functional equivalent of cash, and, if so, whether the regulation should be revised to prohibit contributions in excess of \$100 made by such prepaid cards.

In several recent advisory opinions, the Commission approved the use of text messaging to process political contributions ( $\underline{AOs~2012-30}$  (Revolution Messaging LLC),  $\underline{2012-28}$  (CTIA – The Wireless Association),  $\underline{2012-26}$  (Cooper for Congress, ArmourMedia, Inc., & mQube, Inc.), and  $\underline{2012-17}$  (Red Blue T LLC, ArmourMedia, Inc., & mQube, Inc.)). The Commission asks for public input on whether it should amend its regulations to address contributions made by text message, and, if so, whether it should take the approach of these advisory opinions.

## **Public Comments**

The complete text of the ANPRM is available at <a href="http://sers.nictusa.com/fosers/showpdf.htm?docid=103948">http://sers.nictusa.com/fosers/showpdf.htm?docid=103948</a>. Written comments must be submitted on or before June 3, 2013. Comments may be submitted on paper, but the Commission highly encourages submitting comments electronically to ensure timely receipt and consideration. Electronic comments may be submitted via the Commission's website at <a href="http://www.fec.gov/foser">http://www.fec.gov/foser</a>.

Paper comments should be sent to the Federal Election Commission, Attn: Amy L. Rothstein, Assistant General Counsel, 999 E Street, N.W., Washington, DC 20463. All comments must include the full name and postal service address of the commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post all comments to its website at the conclusion of the comment period.

(Posted 5/3/2013; By: Isaac Baker)

#### Resources:

• Commission consideration of ANPRM



• FEC Regulations

# **Advisory Opinions**

# AO 2012-38 – Socialist Workers Party

The Federal Election Commission has renewed until December 31, 2016, the partial reporting exemption for the Socialist Workers Party, the Socialist Workers Party National Campaign Committee, other Socialist Workers Party committees, and authorized committees of Federal candidates of the Socialist Workers Party (henceforth "SWP" or "SWP committees"). The Commission has renewed the exemption based on a long history of systematic harassment of the SWP, including evidence of harassment since 2009 (when the exemption was last granted).

# **Background**

The SWP was first granted a partial reporting exemption in a consent decree that resolved Socialist Workers 1974 National Campaign Committee v. Federal Election Commission, Civil Action No. 74-1338 (D.D.C. 1979). In that case, the SWP brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act deprived the SWP and supporters of their First Amendment rights because of the likelihood of harassment resulting from mandatory disclosure of contributors and vendors. Furthermore, the SWP alleged that the governmental interest in obtaining identifying information of contributors and recipients of expenditures was diminished because the possibility of an SWP candidate winning or influencing an election was remote. The consent decree exempted the SWP from the Act's requirements to disclose the identification of contributors to the SWP (including lenders, endorsers, and guarantors of loans) and the identification of persons receiving expenditures from the SWP. However, the SWP was required to maintain records in accordance with the Act and to file reports in a timely manner. Since 1990, the SWP has sought extension of this exemption through the FEC's advisory opinion process. See Advisory Opinions (AOs) 2009-01, 2003-02, 1996-46 and 1990-13. The SWP committees ask if they continue to qualify for the partial reporting exemption.

#### **Analysis**

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court recognized that, under certain circumstances, the Act's requirement to disclose the names, addresses,

occupations, and employers of persons who contribute over \$200 during the calendar year (2 U.S.C. §424(b)) would be unconstitutional because the threat to their First Amendment rights resulting from disclosure would outweigh the interest in disclosure. According to the Court's opinion, "minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim [for a reporting exemption]... The evidence offered need only show a reasonable probability that the compelled disclosure ... will subject them to threats, harassment, or reprisals from either the government or private parties." 424 U.S. at 74.

Following this case law, the Commission must first determine whether the SWP continues to maintain its status as a minor party. 424 U.S. at 68-74. Previously, the Commission has determined that the SWP is a minor party. AO 2009-01 (SWP). As evidenced by the low vote totals for SWP candidates, the lack of success in ballot access, and the small total amounts of contributions to SWP committees, the Commission concludes that the SWP remains a minor party that is out of the mainstream.

Next, the Commission must weigh three factors:

- The history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by governmental authorities, including law enforcement agencies, or by private parties;
- Evidence of continuing violence, harassment, or threats directed at the SWP or its supporters since the prior exemption was granted; and
- Balanced against these factors, the governmental interest in obtaining identifying information of contributors and recipients of expenditures.

There is a long history of threats, violence, and harassment against the SWP and its supporters by Federal and local law enforcement agencies and private parties. The Commission has consistently viewed the SWP's requests for exemption from the Act's reporting requirements in light of this "long history of governmental harassment of the SWP." AO 2009-01. Reviewing information presented with this request indicates that the SWP and persons associated with it have continued to experience harassment from private sources from the end of 2009 to the present. Although some of the alleged incidents of harassment may seem minor or subject to differing interpretations, there are a number of examples, such as firings and instances of workplace intimidation, as well as verbal threats and harassment, that legitimately raise concern by those associated with the SWP, particularly when these examples are taken together. Considering that these incidents occurred over four years, there are relatively more of them annually than incidents that took place during the six-year period before the Commission when it granted the most recent extension of the partial reporting exemption in AO 2009-01.

Ultimately, the governmental interest in obtaining the names, addresses, and other identifying information of SWP contributors and vendors doing business with the SWP committees in connection with Federal elections remains very low and continues to be outweighed by the reasonable probability of threats, harassment, or reprisals resulting from such disclosure. The SWP has experienced a decline in episodes of harassment of serious magnitude, but has submitted some credible evidence of threats and intimidation. When weighed together with the very small amounts of money raised and the significant past history, the recent evidence of harassment thus satisfies the requirement of demonstrating a reasonable probability of harassment.

Thus, the Commission granted the SWP committees a partial reporting exemption as provided for in the consent agreements and continued in previous advisory opinions. As required in previous advisory opinions, each SWP committee must assign a code number to each individual or entity from whom or which it receives one or more contributions aggregating in excess of \$200 in a calendar year or applicable election cycle (depending on the type of committee). See AO 2009-01. Further, the SWP must comply with all of the remaining requirements of the Act and Commission regulations.

At least 60 days prior to December 31, 2016, the SWP may submit a new advisory opinion request seeking a renewal of the exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after December 31, 2012, or the lack thereof, in making a decision regarding renewal.

Date Issued: 4/25/2013; 12 Pages

(Posted 5/3/2013; By: Christopher Berg)

#### Resources:

Advisory Opinion 2012-38 [PDF; 12 pages]

• Concurring Opinion (Weintraub) [PDF; 2 pages]

# **AO 2013-01 1787 National Committee Does Not Qualify as a National Party Committee**

The 1787 National Committee (1787 Party) has yet to place any federal candidates on a state ballot. As such, it does not currently meet the definition of "political party" under the Federal Election Campaign Act (the Act) and Commission regulations, and does not qualify as a national committee of a political party.

## **Background**

The 1787 Party initially registered with the Commission as a nonconnected political committee on January 24, 2013. Its stated purpose is to "plan the nominating convention, promote candidates, adopt the party platform and rules, and fundraise for the 1787 Party." The Committee maintains that it is "on track to achieve ballot access" for a number of candidates in several states for elections held in 2014, but to date has not placed any federal candidates on a state ballot.

## Analysis

The Act defines a national committee of a political party as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." 2 U.S.C. §431(14); 11 CFR 100.13.

The Act defines a political party as "an organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such...organization." 2 U.S.C. §431(16); 11 CFR 100.15. Therefore, to be

considered a "political party" for purposes of the Act, an organization must first place a federal candidate on a ballot under that organization's name.

The Commission concluded that since the Party has not yet placed a federal candidate on a state ballot, it has not yet met the Act's definition of "political party," and therefore is not a national party committee. The mere intention to place candidates on the ballot does not suffice. See Advisory Opinion 1980-03 (Citizens Committee).

Date Issued: May 9, 2013; Length: 3 pages.

(Posted 5/22/13; By: Myles Martin)

#### Resources:

Commission Discussion of AO 2013-01

Advisory Opinion 2013-01 [PDF]

# **AO 2013-02 – DOMA Limits Application of Spouse Contribution Rules**

The Defense of Marriage Act (DOMA) prohibits a candidate's principal campaign committee from applying the spousal contribution rule to contributions it accepts from same-sex couples married under state law. However, the Commission said it would revisit this issue if the Supreme Court finds DOMA to be unconstitutional.

# **Background**

Dan Winslow, a Senate candidate for the Massachusetts special primary on April 30, asked the Commission whether his campaign may apply the spouse contribution rule in 11 CFR 110.1(i) to contributions his campaign receives from same-sex couples married under state law.

Specifically, the campaign wanted to know if it could attribute a contribution as being from each member of the couple even though the money originated from the income of just one of them.

#### **Analysis**

The Commission determined that campaigns may not apply the spouse contribution rule to contributions from same-sex couples married under state law because it would violate DOMA.

The Federal Election Campaign Act of 1971, as amended ("FECA"), provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to affect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. §441f; see also 11 CFR 110.4(b).

An exception to this law states that "limitations on contributions ... shall apply separately to contributions made by each spouse even if only one spouse has income." 11 CFR 110.1(i). Thus, a spouse with no separate income may make a contribution in his or her own name through the checking account of the other spouse. AO 1980-11 (Rufus C. Phillips III).

The term "spouse" is not defined in FECA or the Commission's regulations. DOMA, however, provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various ... agencies of the United States, ... the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. §7. That definition requires the Commission to conclude that the Committee may not apply the spouse contribution rule to contributions from spouses who are not "of the opposite sex."

The Commission noted that several courts have found DOMA to be unconstitutional, but the legal effect of those decisions has been stayed pending the Supreme Court's consideration DOMA in *United States v. Windsor*, No. 12-307 (S. Ct.) (argued Mar. 27, 2013). If DOMA is held to be unconstitutional by the Supreme Court – or is otherwise modified or repealed – the Commission will, upon request, revisit this issue.

Date Issued: April 25, 2013; 4 pages

(Posted 05/02/13; By: Alex Knott)

## Resources:

Advisory Opinion 2013-02 [PDF; 4 pages]

Commission Discussion of AO 2013-02

• <u>Concurring Opinion (Weintraub)</u> [PDF; 2 pages]

# Reporting

# **New On-line Password System for E-Filers**

Beginning Wednesday, May 15, committees registered with the Federal Election Commission (FEC) will be able to obtain or change their electronic filing password on-line at <a href="http://www.fec.gov/elecfil/passwords.shtml">http://www.fec.gov/elecfil/passwords.shtml</a>.

The new system will offer registered filers three options:

- 1) Create a New Electronic Filing Password (Only for Registered Committees Filing Electronically for the First Time)
- 2) Retrieve a Forgotten Electronic Filing Password
- 3) Change an Existing Electronic Filing Password

For security purposes, committees will need to provide information to verify their identity. Additionally, committees must have an official email address listed on the Statement of Organization (FEC Form 1) filed with the FEC. The Commission will use that address to notify a committee of any changes to its account. If you would like to update your email address or add a second address, please amend your FEC Form 1.

All existing electronic filing passwords remain valid, so if you already have a password you don't need to take any action. If you have forgotten your password, you will need to contact the Electronic Filing Office (EFO) to gain access to the new system.

At this time, the on-line password system is available only to registered political committees. Other filers will still need to email or fax their electronic filing password requests.

For help with technical issues relating to FECFile or electronic filing, please contact the EFO at 1-800-424-9530 and press 4 or call 202-694-1307. The FECFile User Manual and other resources for electronic filers are available at <a href="http://www.fec.gov/support/index.shtml">http://www.fec.gov/support/index.shtml</a>.

(Posted 5/3/2013; By: Reports Analysis Division)

### **Resources:**

- Electronic Filing home page
- Reports Analysis Division FAO on Electronic Filing

# Outreach



# FEC to Host Reporting and E-Filing Workshops in June and July

The Commission will offer reporting and FECFile workshops in June and July 2013. The workshops for candidates will be offered online as a webinar and will be held on June 26. The sessions for PACs and party committees will be held on July 10, both at the Commission and online as a webinar for those who cannot attend in-person.

The reporting sessions will address common filing problems and provide answers to questions committees may have as they prepare to file their July Quarterly, Monthly or Mid-Year reports. The electronic filing sessions will demonstrate the Commission's FECFile software and address questions filers may have concerning electronic filing. An advanced FECFile session will be offered for PAC/party in-person attendees only.

Webinar Information. All sessions will be available to online attendees, excluding the advanced FECFile session. Additional instructions and technical information will be provided to those who register for a webinar.

*In-person Attendees*. Attendance for the on-site PAC and party workshops is limited to 50 people per reporting workshop, 8 people for FECFile for Beginners and 8 people for Advanced FECFile. The workshops will be held at the FEC at 999 E Street, N.W., Washington, DC. The building is within walking distance of several Metro stations.

Registration Information. The registration fee is \$25 per workshop to attend in-person or \$15 to participate online. For the candidate webinars, a full refund will made for all cancellations received before 5 p.m. EDT on Friday, June 21; no refunds will be made for cancellations received after that time. For the PAC and party workshops, a full refund will made for all cancellations received before 5 p.m. EDT on Friday, July 5; no refunds will be made for cancellations received after that time. Complete registration information is available on the FEC's website at <a href="http://www.fec.gov/info/outreach.shtml#roundtables">http://www.fec.gov/info/outreach.shtml#roundtables</a> and from Faxline, the FEC's automated fax system (202/501-3413, request document 590).

# **Registration Questions**

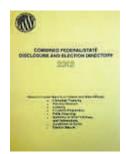
Please direct all questions about the roundtable/webinar registration and fees to Sylvester Management at 1-800/246-7277 or email <u>Rosalyn@sylvestermanagement.com</u>. For other questions, call the FEC's Information Division at 800/424-9530 (press 6), or send an email to <u>Conferences@fec.gov</u>.

(Posted 5/24/2013; By: Molly Niewenhous)

### **Resources:**

• FEC Educational Outreach Opportunities

# 2013 Combined Federal/State Disclosure Directory Now Available



The 2013 edition of the Combined Federal/State Disclosure and Election Directory is available on the Commission's website (<a href="www.fec.gov">www.fec.gov</a>). This directory identifies the federal and state agencies responsible for the disclosure of campaign finances, lobbying, personal finances, public financing, candidates on the ballot, election results, spending on state initiatives and other financial filings.

The Directory is available at <a href="http://www.fec.gov/pubrec/cfsdd/cfsdd.shtml">http://www.fec.gov/pubrec/cfsdd/cfsdd.shtml</a>. Printed editions of the Directory are also available. To order a copy, please contact the FEC's Public Disclosure Division at 800/424-9530 or 202/694-1120.

#### **Resources:**

• FEC Public Disclosure Division